Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MARIELENA DUERRING
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

FILED
Jul 26 2011, 9:31 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

SHAWN MICHAEL DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1011-CR-649
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-1006-FD-476

July 26, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Shawn Michael Davis (Davis), appeals his conviction for Count I, theft, a Class D felony, Ind. Code § 35-43-4-2 and his adjudication as an habitual offender, I.C. § 35-50-2-8.

We affirm.

ISSUE

Davis raises two issues on appeal, which we consolidate and restate as: Whether the State presented sufficient evidence beyond a reasonable doubt that Davis was guilty of theft.

FACTS AND PROCEDURAL HISTORY

On May 29, 2010, Officer Chadwick Goben (Officer Goben) was investigating a report of an automobile theft in South Bend, Indiana, when he noticed Davis who was walking down the street. Officer Goben stopped Davis and asked him where he came from. Davis replied "the store." (Transcript p. 71). Officer Goben requested Davis to place his hands on the hood of his police car so he could be patted down. During the search, the Officer lifted up Davis' shirt and noticed three bottles of McGuire Ultimate Compound Wax and one bottle of McGuire's Ultimate Protection Cleaning in the pockets of Davis' trousers. All the bottles were new and unopened. Davis did not have a sale receipt for these items.

Officer Goben asked dispatch to inquire at the nearby Auto Zone whether a recent theft had occurred there. The dispatch officer informed Officer Goben that a recent theft had occurred there but that the employees at the store had not had an opportunity to report the theft yet as they had been busy with customers. Officer Goben took Davis to the Auto Zone

store, which was less than two blocks away. Davis remained in the patrol car while Officer Goben went inside the store to speak with Vernon Lighthall (Lighthall), the store manager. Lighthall identified Davis as an individual who had been in the store earlier that same day and who had been in the area of the store where the McGuire products are displayed. Lighthall told the Officer that Davis frequently visited the Auto Zone store. When Lighthall noticed that Davis was in the store, he asked him to leave as Auto Zone has a policy of asking possible shoplifters to leave the store instead of confronting them. After Lighthall identified Davis, Officer Goben showed Lighthall the four bottles of car products. Lighthall scanned the bottles' U.P.C. code into the computer and discovered that the store carried those products. Checking the shelves where the McGuire products are kept, Lighthall discovered four bottles missing.

On June 1, 2010, the State filed an Information charging Davis with theft, a Class D felony, I.C. § 35-43-4-2. On July 16, the State amended its Information, adding a habitual offender charge, I.C. § 35-50-2-8. On September 16, 2010, a jury trial was conducted. At the close of the evidence, the jury found Davis guilty of theft. Subsequently, Davis pled guilty to the habitual offender charge. On November 16, 2010, the trial court sentenced Davis to three years for the Class D felony theft conviction, enhanced by three years for the habitual offender adjudication.

Davis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Davis contends that the State failed to present sufficient evidence to establish that he committed theft. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences to be drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. *Id*. at 213. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

In order to convict Davis of theft, the State was required to prove beyond a reasonable doubt that "Davis did knowingly exert unauthorized control over the property of Auto Zone, to-wit: various items of merchandise, by possessing same, with the intent to deprive Auto Zone of any part of the use or value of the property."[1] *See* I.C. § 35-43-4-2; Appellant's App. p. 73. Davis' main contention focuses on the possession of the unopened bottles of McGuire car products. Specifically, he claims that the State failed to establish that "he knew in fact that the bottles were stolen." (Appellant's Br. p. 6).

Recently, our supreme court abandoned the "mere possession" rule, which held that the mere unexplained possession of recently stolen property, standing alone, does not automatically support a conviction for theft. *See Bolton v. State*, 261 N.E.2d 841 (1970).

[1] In sofar Davis is challenging the language of the charging Information as a separate issue, we note that this claim is waived for our review as Davis failed to object to the Information at trial. *See Blanchard v. State*, 802 N.E.2d 14, 32 (Ind. Ct. App. 2004).

Instead, in *Fortson v. State*, 919 N.E.2d 1136, 1143 (Ind. 2010), our supreme court proclaimed that

> the mere unexplained possession of recently stolen property standing alone does not automatically support a conviction for theft. Rather such possession is to be considered along with the other evidence in a case, such as how recent or distant in time was the possession from the moment the item was stolen, and what are the circumstances of the possession (say, possessing right next door as opposed to many miles away). In essence, the fact of possession and all the surrounding evidence about the possession must be assessed to determine whether any rational juror could find the defendant guilty beyond a reasonable doubt.

Applying the *Fortson* elements to the case before us, we must conclude that the State carried its burden of proof. After being stopped by Officer Goben and being questioned by him, Davis told the Officer that he was coming from "the store." (Tr. p. 71). Officer Goben found four bottles of new, unopened McGuire car products in Davis' trouser pockets, for which Davis was unable to produce a sales receipt even though he claimed to have just visited the store. Upon making inquiries, Officer Goben established that a nearby Auto Zone had just discovered a theft.

At the store, Davis was identified by Lighthall, Auto Zone's manager, as a frequent visitor. Lighthall told the Officer that Davis had been in the store earlier that day and was seen in the area of the store where the McGuire products are displayed. Lighthall also noted that when he saw Davis in the store, he asked Davis to leave as Auto Zone has a policy of asking possible shoplifters to leave the store instead of confronting them. Lighthall scanned the bottles' U.P.C. code into the computer and discovered that the store carried those products and that four of those bottles were missing.

In light of the *Fortson* elements and based on the surrounding evidence of the possession, we conclude that the State presented sufficient evidence from which a trier of fact could reasonably infer that Davis knowingly exerted unauthorized control over Auto Zone's property.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to establish beyond a reasonable doubt that Davis had committed theft.

Affirmed.

DARDEN, J., and BARNES, J., concur.